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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Toll Free Access Codes ) CC Docket No. 95-155  
)  
Database Services Management, Inc. ) NSD File Nos. L-99-87  
and Beehive Telephone Company, Inc. ) and L-99-88  
Petitions for Declaratory Rulings )

To: The Commission

**PETITION FOR RECONSIDERATION**

Beehive Telephone Company, Inc. ("Beehive"), by its attorney, and pursuant to § 405(a) of the Communications Act of 1934, as amended ("Act"), and § 1.429(a) of the Commission's Rules ("Rules"), hereby petitions the Commission to reconsider its Fifth Report and Order in CC Docket No. 95-155 and its Orders in NSD File Nos. L-99-87 and L-99-88. *See Toll Free Service Access Codes*, FCC 00-237 (July 5, 2000) ("Order"). In support thereof, the following is submitted:

**STANDING**

Beehive filed comments in response to the summary recommendation of the North American Numbering Council ("NANC") that Database Service Management, Inc. ("DSMI") continue as the toll free number database administrator.<sup>1/</sup> Beehive also initiated and participated in the Commission's declaratory ruling proceedings in NSD File Nos. L-99-87 and L-99-88.<sup>2/</sup> By its

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<sup>1/</sup> See Reply Comments of Beehive Tel. Co., Inc., CC Docket No. 95-155 and NSD File No. L-98-85 (July 13, 1998).

<sup>2/</sup> See Petition for Declaratory Ruling, NSD File No. L-99-88 (Jan. 29, 1999) ("Petition"); Motion to Strike and Response to Request for Expedited Action, NSD File No. L-99-87 (Mar. 1, 1999) ("Motion"); Reply Comments of Beehive Tel. Co., Inc., NSD File Nos. L-99-88 & L-99-88 (Dec. 16, 1999).

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*Order*, the Commission denied the relief Beehive sought in both Docket 95-115 and in the declaratory ruling proceedings. And the Commission's decision to permit the 800 Service Management System (SMS/800) Functions Tariff ("SMS Tariff") to remain in effect will cause Beehive to pay 20 times more for numbering administration than if the Commission invalidated the SMS Tariff and implemented § 251(e) of the Act.<sup>3/</sup> Consequently, Beehive has statutory standing to seek reconsideration of the *Order*. See 47 U.S.C. § 405(a).

Beehive relies on facts not previously presented to the Commission. Those facts were obtained by Beehive recently in discovery in its litigation with DSMI in federal district court in Utah.<sup>4/</sup> New evidence was gained during the deposition of DSMI's President, Michael J. Wade, on June 20, 2000, and from documents produced by DSMI on June 30, 2000. Consideration of Beehive's new evidence is appropriate, because the evidence only became available to Beehive long after the pleading cycles ended in these proceedings. See 47 C.F.R. § 1.429(b)(2).

### ARGUMENT

#### I. New Evidence Proves That The BOCs Jointly Are The Toll Free Number Administrator

DSMI is a straw man as far as toll free number administration is concerned. The BOCs jointly, not DSMI, serve as the toll free number administrator.

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<sup>3/</sup> Beehive estimated that its contribution to support number administration (including toll free numbers) for the period March 2000 to June 2001 would be \$159 if toll free numbers were administered in accordance with Subpart 52B of the Rules. Under the current regime, Beehive will pay the Bell Operating Companies ("BOCs") \$3,266 for the administration of toll free numbers and \$25 for the administration of all other numbers. See Brief for Petitioner at 22, *Beehive Tel Co., Inc. v. FCC*, No. 99-1328 (D.C. Cir. Oct. 28, 1999).

<sup>4/</sup> See *Database Serv. Management, Inc. v. Beehive Tel. Co., Inc.*, Civil No. 2:96 CV 0188K (C.D. Utah filed Mar. 1, 1996).

Bell Atlantic (now Verizon Communications), BellSouth Telecommunications, Inc., SBC Communications, and U S West (now Qwest) claimed in these proceedings that they, not DSMI, “administer” the SMS/800 system and “provide” SMS/800 service.<sup>5/</sup> Those claims are nowhere mentioned in the *Order*. But they are unmistakably true.

A.     The SMS Tariff Makes The BOCs  
          The Toll Free Number Administrator

The Commission now recognizes that the interests of the BOCs in toll free number administration are “sufficiently aligned that they may be deemed collectively to be a telecommunications provider.” *Order*, at 10. Hence, Beehive will sometimes refer to the BOCs collectively as a single entity.

The Commission calls DSMI “the entity that administers the toll free numbering system pursuant to the SMS Tariff.” *Order*, at 8. It also recognizes that DSMI “exercises no discretion” under the tariff. *Id.* at 11. On tariff matters, DSMI simply does what the representatives of the BOCs on the SMS Management Team (“SMT”) tell it to do. *See Wade Dep. Tr.* at 72-73.<sup>6/</sup>

According to Mr. Wade, DSMI acts as the agent for the BOCs.<sup>7/</sup> Moreover, the Commission seems to recognize that DSMI functions under the SMS Tariff as the agent of the BOCs. *See Order*, at 15-16. *See also Beehive Tel. Co., Inc. v. The BOCs*, 10 FCC Rcd 10562, 10568 (1995),

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<sup>5/</sup>     Comments of the Bell Operating Companies, NSD File Nos. 99-87 & 99-88. at 5 (Dec. 2, 1999).

<sup>6/</sup>     The transcript of Mr. Wade’s deposition is provided as Attachment 1 hereto.

<sup>7/</sup>     *See* Letter of Michael J. Wade to N. M. Grove, at 1 (Mar. 4, 1999). A copy of this letter is attached as Attachment 2 to this petition. The letter was apparently addressed to Mike Grove, Steve Chappell, and Ward Reed, who comprised DSMI’s Board of Directors at the time. *See Wade Dep. Tr.* at 17-22.

*reaffirmed*, 12 FCC Rcd 17930 (1997). If DSMI is the agent, then the BOCs is the entity that administers the toll free numbering system. That is certainly the way the BOCs hold themselves out in the SMS Tariff.

In their tariff, the BOCs state that toll free numbers (the tariff uses the term “800” to include all toll free numbers) are “administered” through the SMS/800. SMS Tariff § 2.1. They hold themselves out as undertaking to provide 800 “number administration,” *see id.* § 2.1.4, which the tariff defines as the “process of assigning, reserving, and releasing 800 telephone numbers for public use.” *Id.* § 2.7. Standards for “800 number administration” are set out throughout the tariff.<sup>8/</sup> Finally, the tariff imposes a monthly per-number “customer record administration” (“CRA”) charge for administrative services, including “number search and reservation functions, as well as activation and modification of 800 numbers.” *Id.* §§ 4.1.2(C), 4.2(C).

The SMS Tariff constitutes the law, *e.g.*, *MCI Telecomms. Corp. v. Graham*, 7 F.3d 477, 479 (6th Cir. 1993), as to all subjects specifically addressed by the tariff, *see AT&T Co. v. Central Office Tel., Inc.*, 118 S.Ct. 1956, 1964 (1998), including the regulations governing toll free number administration. By publishing the SMS Tariff, the BOCs established the law that “conclusively and exclusively” controls DSMI and the toll free numbering system. Hence, by operation of law, the BOCs must be a toll free number administrator. But they constitute a “discrete industry segment” and clearly do not qualify as an impartial administrator under § 251(e)(1) of the Act or § 52.12(a)(1) of the Rules. *Toll Free Service Access Codes*, 12 FCC Rcd 11162, 11224 (1997).

The Commission is asked to explain how the BOCs can be paid more than \$70 million in

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<sup>8/</sup> See SMS Tariff §§ 2.1.4, 2.1.7, 2.2.2, 2.3.1(A), 2.3.2(A).

SMS Tariff charges to perform toll free number administration and not be the toll free number administrator. Moreover, the Commission should explain how DSMI can administer toll free numbers in accordance with the terms of the BOCs' SMS Tariff, as well as the terms of the so-called "DSMI Business Representative contract with the SMT,"<sup>9/</sup> and still be "insulated from undue influence by the BOCs." *Order*, at 11.

B.     The BOCs, Through Their SMT, Direct  
          The Management And Policies Of DSMI

Under "criteria one" of the Commission's neutrality rule, "A person *shall* be deemed to control another if such person possesses, directly or indirectly . . . [t]he power to direct or cause the direction of the management and policies of such other person . . . by contract (including but not limited to shareholder agreement . . . operating agreement), or otherwise." 47 C.F.R. § 52.12(a)(1)(i)(C) (emphasis added).<sup>10/</sup> Under that criteria, the Commission must deem DSMI to be controlled by the BOCs, and therefore affiliated with the BOCs. *See id.* § 52.12(a)(1)(i).

The Commission acknowledged the BOCs own and control the entire "toll free number administration system." *Order*, at 12. In particular, the Commission found that: (1) the BOCs own

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<sup>9/</sup> Letter of Michael J. Wade to Karen N. Mulberry, at 5 (Dec. 10, 1997) (copy attached as Attachment 3).

<sup>10/</sup> Beehive assumes that § 52.12 of the Rules was promulgated in compliance with the requirements of § 553 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. However, research has failed to uncover a notice of proposed rulemaking that complies with § 553(b). All we located was a public notice soliciting comments on various recommendations of the NANC. *See The NANC Issues Recommendations on the NANPA, B&C Agent, and Related Rules; Pleading Cycle Established*, 13 FCC Rcd 1449 (Com. Car. Bur. 1997). It also appears the Commission enforced § 52.12(a)(1)(i) of the Rules before the rule went into effect in accordance with APA § 553(d). *See Administration of the NANP*, 12 FCC Rcd 23040, 23080 (1997) (finding *de minimis* violation of the just-adopted § 52.12(a)(1)(i)).

the SMS/800 database, *see id.* at 3; (2) the BOCs filed the SMS Tariff which governs the administration of toll free numbers, *see id.* at 10-11; (3) the representatives of the BOCs comprise the SMT, which is “responsible for coordination of SMS/800 services,” *id.* at 3; (4) DSMI is under contract with the SMT and serves as the “business representative” of the BOCs, *id.*; and (5) under that contract DSMI is responsible for the “day-to-day management and oversight of SMS/800 services.” *Id.* at 10. Evidence obtained by Beehive proves that the BOC control all aspects of the SMS/800 database system, just like they did in 1993. *See Provision of Access for 800 Service*, 8 FCC Rcd 1423, 1427 (1993).

Prior to the sale of Bellcore (now Telcordia) to Science Applications International Corporation (“SAIC”) in November 1997, the SMT unquestionably controlled DSMI. While it claimed to make day-to-day decisions involving the SMS/800 database, DSMI was required under its contract with the BOCs to consult with the SMT “on all issues falling outside of standard operations.”<sup>11/</sup> That practice continued after the Bellcore sale, when a contract between DSMI and the BOCs (or the SMT) went into effect. *See Wade Dep. Tr.* at 50.<sup>12/</sup>

According to Mr. Wade, who took part in the contract negotiations, DSMI (with its five or six employees) is paid in excess of \$1 million a year to work under a contract with the BOCs. *See id.* at 30, 49, 52. Again according to Mr. Wade, the SMT manages SMS/800 access service, as well as the BOCs’ contract with DSMI. *See id.* at 70-71. DSMI serves as the SMT’s business

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<sup>11/</sup> Letter of Paul Walters et al. to William F. Caton, File No. E-94-57, at 2 (Apr. 20, 1995).

<sup>12/</sup> In 1997, Mr. Wade indicated that DSMI had a contract with the SMT. *See infra* Attach.3, at 5. At his deposition, he referred to a contract with the BOCs. The Commission determined that DSMI has a contract with the SMT. *See Order*, at 3.

representative, and it performs ministerial functions for the SMT. *See id.* at 122, 126, 129. For example, Mr. Wade drafts correspondence sent out on SMT stationary, prepares the agenda for SMT meetings, takes notes during those meetings, and even types the minutes. *See id.* at 174, 207-10, 235.

Documents obtained by Beehive show that the SMT directs the management and policies of DSMI. Mr. Wade testified that the SMT meets in person every six weeks or so, and confer by telephone every two or three weeks. *See Wade Dep. Tr.* at 129. Notes of SMT meetings and conference calls held after SAIC acquired Bellcore (and DSMI) show that the SMT makes policy decisions for DSMI.<sup>13/</sup> For example, at its meeting in New York City on March 9-10, 2000, the SMT had an “in depth discussion” of the team’s strategic plans for dealing with SMS/800 issues.<sup>14/</sup> During the discussion the SMT members reported that the BOCs “remained committed to maintaining their current role” in the provision of SMS/800 services.<sup>15/</sup> The SMT reached agreements on several “action items,” which would be implemented by various DSMI employees (Mr. Wade, Anil Patel, Erik Chuss, and Joseph Casey).<sup>16/</sup>

The notes of the New York City meeting demonstrates that the SMT makes the policy decisions, which DSMI is relegated to carrying out. With respect to strategic planning, the SMT

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<sup>13/</sup> Copies of the notes of the SMT meetings and conference calls (some of which have been redacted by DSMI) are attached collectively as Attachment 4.

<sup>14/</sup> SMT Mar. 9-10, 2000 Meeting Notes, at 1 (DSMI 000252).

<sup>15/</sup> *Id.*

<sup>16/</sup> *See id.* at 1-2.

directed Mr. Wade to make changes in an “Action Plan for Addressing Industry Concerns.”<sup>17/</sup> The SMT decided to take steps to build a stronger relationships with small and medium-sized RespOrgs, and to work on “contentious issues” on a case-by-case basis with small groups.<sup>18/</sup> As part of a public relations effort to counteract “performance concerns,” the SMT agreed to work with a SMS/800 Performance Improvements Team to define acceptable solutions. It decided to release a “high-level summary” of a user survey apparently conducted by the Taylor Group. It also decided to:

implement a positive public relations approach in dealing with the users. Positive information regarding SMS/800 services will be disseminated as often as possible. Any potentially negative situations will be contained as effectively as possible.<sup>19/</sup>

The SMT agreed in New York to work to develop an “ongoing relationship” with the Commission staff, and it decided that the initial contact with the staff would be to address the definition of “number administration” and how it is handled for toll free numbers. The SMT decided to review its options with respect to the Commission’s “possible reactions to current industry activities,” and to prepare for a meeting to be held after an “ex parte visit” to the Commission scheduled for March 15, 2000.<sup>20/</sup>

In addition to making strategic plans, the SMT made routine management and operations decisions. It approved a \$14,000 second quarter incentive award to the SMS/800 Help Desk. The

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<sup>17/</sup> See *id.* at 1.

<sup>18/</sup> See *id.* at 2.

<sup>19/</sup> SMT Mar. 9-10 Meeting Notes, at 2.

<sup>20/</sup> See *id.* The SMT also anticipated that the Commission would respond by mid-year to issues raised by several toll-free carriers in an ex parte meeting with the Commission on February 17, 2000, and that the issues would “probably be addressed” when the Commission resolved the Beehive “matter.” See *id.* at 3.



SMT also authorized “moving MGI testing to Dallas” as long as SCP testing is not “impacted.”<sup>21/</sup> The SMT considered modifying the SMS Tariff to allow for “single customer proprietary work” (if such work “can be conducted for a profit”), and it discussed potential new rate elements.<sup>22/</sup>

Documentary evidence now establishes that the SMT exercises plenary decision-making authority with respect to DSMI’s involvement with the SMS/800 system. In addition to its management authority with respect to the provision of the tariffed SMS/800 access services, the SMT manages the contract under which DSMI operates. *See* Wade Dep. Tr. at 70-71. The SMT negotiates the contracts with the SMS/800 vendors, including SBC Communications, Telcordia, and Skyes Enterprises.<sup>23/</sup> It maintains its own bank account, receives the monies generated by SMS/800 operations (the SMS Tariff charges and payments pursuant to contracts with SCP owners), signs the checks to pay vendors, and distributes profits evenly among the BOCs. *See id.* at Tr. 127-30, 133, 177, 180-81, 183. Moreover, the SMT makes decisions with respect the budget,<sup>24/</sup> accounting matters,<sup>25/</sup> tax issues,<sup>26/</sup> advertising,<sup>27/</sup> litigation with Beehive,<sup>28/</sup> and ex parte contacts with the

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<sup>21/</sup> *Id.* at 5.

<sup>22/</sup> *See id.* at 4, 6.

<sup>23/</sup> *See* SMT Feb. 3, 1999 Conference Call Notes, at 1 (DSMI 000232).

<sup>24/</sup> *See* SMT Nov. 3, 1999 Conference Call Notes, at 1-2 (DSMI 000241-42).

<sup>25/</sup> *See id.* at 2; SMT Jan. 6, 2000 Conference Call Notes, at 1 (DSMI 000247).

<sup>26/</sup> *See* SMT Jan. 21-22, 1999 Meeting Notes, at 7 (DSMI 000228).

<sup>27/</sup> *See id.* at 6; SMT Feb. 3, 1999 Conference Call Notes, at 2; SMT Mar. 3, 1999 Conference Call Notes, at 1 (DSMI 000236).

<sup>28/</sup> *See* SMT Jan. 21-22, 1999 Meeting Notes, at 9; SMT Nov. 3, 1999 Conference Call Notes, at 4.

Commission.<sup>29/</sup>

Beehive submits that the evidence shows that the BOCs are still the “real parties in interest” with respect to the SMS/800 system and they still “control all fundamental aspects” of SMS/800 access. *Beehive*, 10 FCC Rcd at 10568. By virtue of the SMS Tariff and the DSMI contract, the BOCs, acting through their SMT, control all of DSMI’s SMS/800 related activities. The SMT makes all the decisions and, as Mr. Wade conceded, DSMI functions as the SMT’s staff. *See Wade Dep. Tr.* 126. Thus, the facts support a finding that the BOCs control DSMI within the meaning of § 52.12(a)(1)(i)(C) of the Rules.

C. The BOCs, Through Their SMT, Exercise  
De Facto Control Over DSMI

The Commission traditionally employs the six-prong *Intermountain Microwave*<sup>30/</sup> test to determine de facto control of a company. *See, e.g., AirGate Wireless, L.L.C., Assignor, and Cricket Holdings, Inc., Assignee*, 14 FCC 11827, 11840 (WTB 1999). The *Intermountain Microwave* test examines six factors that represent the normal incidents of the control of a business: (1) use of facilities and equipment; (2) control of daily operations; (3) control of policy decisions; (4) personnel responsibility; (5) control of financial obligations; and (6) receipt of monies and profits. *See, e.g., Ellis Thompson Corp.*, 9 FCC Rcd 7138, 7140-42 (1994). All six factors point to the conclusion that the BOCs, through the SMT, exercise de facto control over DSMI.

We have already examined *Intermountain Microwave* factors three, five, and six, which all

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<sup>29/</sup> See SMT Jan. 6, 2000 Conference Call Notes, at 2.

<sup>30/</sup> *Intermountain Microwave*, 24 Rad. Reg. (P&F) 983 (1963).

reflect the dominance of the BOCs and their SMT over DSMI.<sup>31/</sup> With respect to factor one, the Commission has already found that the BOCs own the SMS/800 database, *see Order*, at 3, so presumably they have unfettered access to those facilities. Certainly, the SMT uses DSMI's facilities, including its mailing address, *see Wade Dep. Tr.* at 175, which the Commission has considered an indicia of common control. *See Comark Cable Fund III d/b/a CCI Cablevision v. Northwestern Ind. Tel. Co., Inc.*, 100 FCC 2d 1244, 1250-51 (1985). DSMI's equipment is used to prepare documents for the SMT on the SMT's stationary and to distribute material to the SMT members. *See Wade Dep. Tr.* at 174-75. Thus, *Intermountain Microwave* factor one lends some support for a finding that the BOCs are in de facto control of DSMI.

With respect to factor two, the Commission recognized that DSMI conducts its "day-to-day management and oversight of SMS/800 services" in accordance with the terms of its contract with the BOCs or the SMT. *Order*, at 10. It also recognized that the SMS/800 system administers toll free numbers largely via computer interface and without DSMI intervention. *See id.* at 10-11. As the evidence suggests, DSMI's daily activities revolve around "action item" directives from the SMT. *See infra* Attach. 4. Certainly, DSMI does what the SMT tells it to do with regard to the administration of the SMT Tariff. *See Wade Dep. Tr.* at 72. Consequently, substantial evidence supports a finding that the SMT controls DSMI's daily operations.

Turning finally to *Intermountain Microwave* factor four, there is no evidence that the BOCs or the SMT is in charge of the hiring or dismissal of DSMI's employees. However, the SMT certainly supervises DSMI's employees, even to the extent of treating DSMI's officers as clerical

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<sup>31/</sup> The fact that SMT directs DSMI's actions in its litigation with Beehive is an indicia of control. *See LaStar Cellular Tel. Co.*, 5 FCC Rcd 3286, 3289 (1990).

staff. Moreover, the SMT is in control of the employment and supervision of the entities that supply the SMS/800 system hardware and software, as well as the entities that provide management, administrative, maintenance, legal, accounting, and public relations services in support of the system's operations.<sup>32/</sup>

Looking at the totality of the circumstances using the *Intermountain Microwave* criteria discloses a "pattern of circumstances" which, at the very least, raises a substantial question as to whether the BOCs and their SMT exercise de facto control over DSMI. *Ellis Thompson Corp.*, 9 FCC Rcd at 7142. When the Intermountain Microwave analysis is added to the BOCs' claim to being the toll free number administrator, the controlling effectiveness of their SMS Tariff, and their contractual control over DSMI, it becomes patently obvious that the BOCs are legally and factually the toll free number administrators. Hence, the Commission should have considered the partiality of the BOCs, rather than the impartiality of DSMI, under § 251(e)(1) of the Act.

## II. DSMI Cannot Meet The Requirements Of Any Of The Commission's Three Neutrality Criteria

### A. DSMI Is An Affiliate Of The BOCs And Derives A Majority (More Than \$1 Million A Year) Of Its Revenues From Them

Reconsideration is in order even if the Commission does not recognize the BOCs as toll free number administrators. In view of the evidence that the BOCs control DSMI, the Commission must revisit its determination that DSMI is neither an affiliate of any telecommunications carrier, *see Order*, at 9, nor under the undue influence of parties with the vested interest in the outcome of toll

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<sup>32/</sup> The SMT selects the vendors by an RFP process or through interviews. *See* Wade Dep. Tr. at 185-86. It also negotiates vendor contracts, pays the vendors, and supervises their work. *See supra* pp. 9-10 & notes 25-29.

free numbering administration and activities. *See id.* at 10. Based on the record as it now exists, DSMI cannot pass muster under any of the Commission's three neutrality criteria. *See id.* at 9-10.

By virtue of the SMS Tariff and its contract with the BOCs, DSMI must be deemed to be controlled by the BOCs. *See supra* pp. 5-10. That being the case, DSMI flunks criterion one because it is an affiliate of a telecommunications service provider. *See Request of Lockheed Martin Corp. and Warburg, Pincus & Co. for Review of the Transfer of the Lockheed Martin Indus. Servs. Bus.*, 14 FCC Rcd 19792, 19808-09 (1999) ("*Lockheed Order*"). And the Commission already found that DSMI does not meet the requirements of criterion two, since it derives the majority of its revenues (more than \$1 million a year) from the BOCs. *See Order*, at 10.

B. A Finding That DSMI Is Under The Undue Influence Of The BOCs  
Is Encompassed By The Finding That The BOCs Control DSMI

The Commission permitted DSMI to remain the toll free number administer despite its failure to satisfy criterion two, because DSMI is purportedly "insulated from undue influence by the BOCs" by the terms of the SMS Tariff. *See id.* at 11. That strange application of criterion three defies the purposes of § 251(e)(1) of the Act and turns the neutrality criteria on their head.

The Commission was mandated to designate "impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis." 47 U.S.C. § 251(e)(1). An acknowledged purpose of that mandate was to ensure "fair and impartial access to numbering resources." *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 19392, 19508 (1996). The Commission concluded that the numbering administrators "shall be non-governmental entities that are impartial *and* not aligned with any particular telecommunications industry segment." 47 C.F.R. § 52.12(a)(1)

(emphasis added). The Commission's explained its reasoning in *Administration of the North Am. Numbering Plan*, 11 FCC Rcd 2588, 2613 (1995):

The NANP Administrator must be fair and impartial. We believe it would be very difficult, if not impossible for a NANP Administrator closely associated with a particular segment of the telecommunications industry to be impartial. Even if a NANP Administrator aligned with a particular industry segment was impartial, there would still likely be the perception and accusations that it was not.

The intent to prevent the "perception and accusations" of partiality is reflected in the threshold requirement of § 52.12(a)(1) that the NANP Administrator ("NANPA") must be both "impartial and not aligned" with any particular industry segment. Thus, the rule has a prophylactic effect. It prevents the perception that the NANPA is not impartial. Consequently, the rule cannot be read to allow a finding that the NANPA is *controlled* by a telecommunications provider under criterion two to be trumped by a finding that the entity was not subject to *undue influence* by the telecommunications provider under criterion three. Logically and perceptively, an administrator controlled by a telecommunications provider necessarily must be subject to that provider's undue influence.

Obviously, "influence and control are not the same." *News Int'l, PLC*, 97 FCC 2d 349, 356 (1984). An entity's "influence" on a corporation becomes "control" when it reaches the degree that the entity is able to "determine" the corporation's policies or "dominate" corporate affairs. *See id.* To analogize to criminal law, influence is the "lesser included offense" to control. If the BOCs are guilty of controlling DSMT, they are guilty of the lesser offense of "undue influence."

The difference between control and undue influence differentiates criterion three. The first two criteria are "intended to prevent the NANPA from maintaining financial or equity relationships

with telecommunications service providers that could exert control over the decisions and activities of the NANPA or otherwise compromise its impartiality.” *Lockheed Order*, 14 FCC Rcd at 19808. Thus, the rule bans an entity “deemed” to be controlled by a telecommunications provider. *See* 47 C.F.R. § 52.12(a)(1)(i). In contrast, criterion three gives the Commission the “broad discretion to determine whether the entity is subject to undue influence by parties with a vested interest in the outcome of numbering administration activities.” *Lockheed Order*, 14 FCC Rcd at 19808. Hence, criterion three reaches the situation where a party (not necessarily a telecommunications provider) with a vested interest in number administration has undue influence on the administrator falling short of actual control. That less-than-controlling influence becomes “undue influence” when it can be perceived as making the administrator biased.

In this case, we are talking about a telecommunications provider, the BOCs, that the Commission found had a financial relationship with DSMI such that it could exert control over DSMI’s decisions and activities. Thus, the same financial relationship must give the BOCs undue influence over DSMI. The fact that the BOCs pay DSMI more than \$1 million a year gives rise to the reasonable perception that DSMI is biased in favor of the BOCs. The fact that the BOCs pay DSMI in excess of \$1 million for acting as their agent under their SMS Tariff does not change that perception. Moreover, it does not change the fact that the agency relationship aligns DSMI with the BOCs.

C. DSMI’s Unlawful Discrimination Against Beehive Shows That The SMS Tariff Does Not “Insulate” It From The BOCs’ Control

According to the Commission, the SMS Tariff and the Rules ensure both that toll free number administration is “competitively neutral” and DSMI performs its duties “without

discrimination.” *Order*, at 10. Those conclusions strike Beehive as exceedingly odd in light of the BOCs’ dominance over DSMI and their power to amend and/or selectively enforce the tariff, as well as the Commission’s failure to adopt any rules to implement § 251(e) with respect to toll free numbers. With regard to the latter consideration, Beehive notes that by their own terms the Commission’s two “neutrality” rules do not apply to toll free number administration. *See* 47 C.F.R. §§ 52.12, 52.17. Moreover, the Commission overlooked evidence that DSMI discriminated against Beehive.

Beehive charged that DSMI violated the anti-discrimination provisions of § 202(a) of the Act when it departed from the terms of the SMS Tariff to demand that Beehive request for toll free using a “Request for Toll Free Number from the 800-629 Series” form that required Beehive to (1) identify its customer, (2) describe the type of service requested, (3) give the reasons why it is necessary to provide the service through a 800-629 number, and (4) *certify* that the identified customer requested the service as described and for the reasons given. *See* Motion, *supra* note 2, at 3-4, Exhs. 1, 2. Beehive has uncovered additional evidence supporting its charge.

As the Commission knows, Judge Jenkins issued an order on July 13, 1998 that enjoined DSMI to restore “forthwith” all the numbers (except those restored previously) in controversy to Beehive.<sup>33/</sup> In addition, the injunction stated that the parties “should cooperate with each other to the end that this restoration of numbers may occur as expeditiously as possible, so that the numbers may be put into service, becoming usable by . . . Beehive, as quickly as practicable.”<sup>34/</sup> However,

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<sup>33/</sup> *See* Petition, *supra*, note 2, Attach. 6 at 6.

<sup>34/</sup> *Id.* at n.5.



when Beehive sought DSMI's cooperation in beginning the restoration of the 800-629 numbers, Mr. Wade responded by letter (on SMT's stationary) on August 3, 1998 saying only that the "appropriate methodology to be used in assigning the disputed numbers . . . is still being litigated."<sup>35/</sup>

On September 11, 1998, Mr. Wade wrote a memorandum to the SMT members to ask if they had "objections with moving ahead" with negotiations then underway with Beehive.<sup>36/</sup> He informed the SMT that he had discussed the matter with one of DSMI's attorneys and had "one concern: We need to define the conditions under which we would ever agree to release a number for use by Beehive, or any other RespOrg."<sup>37/</sup>

On November 24, 1998, the Tenth Circuit remanded the case to the District Court for referral to the Commission, denied DSMI's motion to suspend the lower court's injunction, and directed that the injunction be narrowed.<sup>38/</sup> Accordingly, on January 20, 1999, Judge Jenkins issued an order amending the injunction to read:

Excepting the numbers which were embraced in the earlier directive of the Court, and which already have been restored to defendant Beehive, all "629" numbers of the 10,000 not currently in use by Beehive or other RespOrgs are to be placed by DSMI in "unavailable" status pending FCC resolution of the matters referred to it by the district court, provided, however, that Beehive shall be allowed to obtain a "629" number from the "unavailable" block when necessary to provide service to a new Beehive customer or additional

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<sup>35/</sup> Letter of Michael J. Wade to A.W. Brothers (Aug. 3, 1998) (Attach. 5 hereto). DSMI had asked Judge Jenkins for a stay of the injunction. DSMI's motion for a stay was denied on August 10, 1998.

<sup>36/</sup> Memorandum of Michael J. Wade to Charron Cox *et al.*, at 1 (Sept. 11, 1998) (Attach. 6 hereto).

<sup>37/</sup> *Id.*

<sup>38/</sup> See Petition, *supra* note 2, Attach. 7 at 15-16.

service to an existing Beehive customer.<sup>39/</sup>

The amended injunction stated that the parties “should cooperate with each other to the end that such additional numbers may be put into service, becoming useable by . . . Beehive, as quickly as possible.”<sup>40/</sup> Once again, Beehive was rebuffed when it attempted to obtain 800-629 numbers from DSMI. On January 26, 1999, Mr. Wade sent Beehive the “Request for Toll Free Number from the 800-629 Series” form. In his letter transmitting the form to Beehive, Mr. Wade recited language from the injunction and asked:

that you provide us with the information indicated on the enclosed form for each number from the 800-629 series that you are requesting. Based on that information, in accordance with the court’s order, if it appears necessary to provide service to your customer through a number from the 800-629 series, then the number will be released and assigned to Beehive.<sup>41/</sup>

As the Commission can plainly see, the District Court’s injunction did not empower or require DSMI to withhold the 800-629 numbers until it is satisfied, based on a certified, written explanation from Beehive, that it is “necessary to provide service to a [Beehive] customer through” an 800-629 number. To the contrary, the injunction clearly stated in mandatory terms that “Beehive *shall* be allowed to obtain a ‘629’ number from the ‘unavailable’ block when necessary” to serve a customer. Not only was DSMI directed to allow Beehive to obtain 800-629 numbers but DSMI was at least encouraged to “cooperate” so that Beehive could put the numbers to use “as quickly as possible.” The injunction simply cannot be read to make DSMI the judge of when an 800-629

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<sup>39/</sup> Petition, *supra* note 2, Attach. 7 at 4.

<sup>40/</sup> *Id.* at n.5.

<sup>41/</sup> Letter of Machael J. Wade to Arthur Brothers (Jan. 26, 1999) (Attach. 7 hereto).

number is “necessary” to provide toll free service to a Beehive customer. And DSMI was otherwise without legal authority to require Beehive to prove that an 800-629 number was needed by a customer.

Under § 52.105(d) of the Rules, the act of reserving a toll free number from the SMS/800 database system constitutes the RespOrg’s certification “that there is an identified toll free subscriber agreeing to be billed for service associated with the toll free number.” 47 C.F.R. § 52.105(d). Nothing in the Rules or in the SMS Tariff regulations authorized DSMI to require Beehive to expressly certify in writing that there is a named subscriber that needs a toll free number for a specified reason. In fact, Beehive is required by § 2.3.1 of the SMS Tariff to “[t]reat all subscriber information as confidential unless otherwise instructed by the subscriber.”

During his deposition, Mr. Wade was quizzed extensively as to DSMI’s refusal to allow Beehive to obtain any 800-629 numbers. Mr. Wade admitted that DSMI was without authority under the SMS Tariff or any other legal authority to monitor, regulate, oversee, or police the relationship between a RespOrg and its subscribers. *See Wade Dep. Tr.* at 132-42. Mr. Wade conceded that DSMI was without any investigative or enforcement authority. *See id.* at 138-41. He admitted that DSMI was treated differently than any other RespOrg. *See id.* at 152-58. Most significantly, Mr. Wade claimed that DSMI never decided what it was going to do with the information it demanded from Beehive, and it never formulated a standard by which it would judge whether it was necessary to provide a service through an 800-629 number. *See id.* at 154-70. Thus, the evidence shows that DSMI afforded Beehive disparate treatment for no reason whatsoever. That should be a per se violation of § 202 of the Act.

For all the foregoing reasons, Beehive respectfully requests that the Commission reconsider

its *Order*.

Respectfully submitted,

BEEHIVE TELEPHONE COMPANY, INC.

By:   
\_\_\_\_\_  
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August 4, 2000



Page 2

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ALAN L. SMITH, ESQ.

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ALSO PRESENT:

CATHY SEYMOUR  
ART BROTHERS (BY PHONE)

(Index appears following the transcript.)

Page 3

## PROCEEDINGS

Whereupon --

MICHAEL WADE

a witness, called for examination, having been  
first duly sworn, was examined and testified as  
follows:

## EXAMINATION

BY MR. SMITH:

Q. Please state your name for the record  
and spell it.

A. Michael Wade. Michael is  
M-I-C-H-A-E-L and Wade is W-A-D-E.

Q. Middle initial?

A. J.

Q. What does that stand for?

A. James.

Q. What's your present residential  
address, Mr. Wade?

A. Summit, New Jersey.

Page 4

Q. How about a business address?

A. Three Corporate Place in Piscataway,  
New Jersey.

Q. What is your present employment, your  
job?

A. I'm president of Database Service  
Management Incorporated, DSMI.

Q. Okay. Now I'm going to call it DSMI,  
if that's okay with you.

A. Uh-huh.

Q. In some of the questions that I'll  
ask, I'll have a tendency, Mr. Wade, to say  
"you." What I mean when I say "you" usually will  
be DSMI. I'll try to keep that straight so that  
we can communicate clearly together. If there's  
any question in your mind, let's talk. Feel free  
to ask me precisely so that we get precise  
communication.

How long have you been the president  
of DSMI?

A. Seven years.

Page 5

Q. And before that were you employed at  
DSMI as well?

A. No, I've been the president since DSMI  
was formed. Prior to that I was with Bellcore.

Q. How long were you at Bellcore?

A. About nine years, I guess.

Q. Okay. You say you became president of  
DSMI when it was formed. Was that in 1983?

A. No.

Q. Or 1993, excuse me.

A. '93.

Q. April of '93?

A. Right.

Q. And have you had any other positions  
as an officer aside from or in addition to  
president at DSMI?

A. I'm not sure what you're asking.

Q. Have you served at DSMI in any  
capacity other than president?

A. No.

Q. Have you been on the board of

Page 6

directors at DSMI at any time?

A. As president I'm on the board of  
directors, but a nonvoting member.

Q. Okay. Have you ever voted on the  
board? Have you ever been a voting member of the  
board?

A. No.

Q. Okay. As a nonvoting member of the  
board of directors of DSMI, are you entitled  
otherwise fully to participate at board meetings  
and in board deliberations?

A. As far as I know.

Q. Okay. What position did you hold at  
Bellcore starting at the beginning of your  
nine-year tenure there and moving forward?

A. Initially I was what they called a  
member of the technical staff working on 800  
number portability.

Q. Can you give me some time frames as  
you describe what you did, when you started  
technical staff?

Page 7

A. Well, I started in December of '94 --  
no, I'm sorry -- no, that's right, December of  
'94. I was a member of the technical staff for,  
I don't know, three years maybe, something like  
that.

Q. December of '94. You mean --

A. December of '84, I'm sorry.

Q. Okay. And then you served on the  
technical staff for how long?

A. Probably three years.

Q. Okay. Then after that what did you do  
at Bellcore?

A. I was a district manager for 800  
number portability for probably -- I don't know  
how many years. A few years. I don't know.  
Maybe three or four years, something like that.

Then I spent two years as the secretary to a  
national team called The National Services  
Coordinating Group, which was a team of RBOC  
representatives, and then I went back to working  
on number portability or 800 number portability

Page 5

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2 DSMI as well?  
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14 Q. And have you had any other positions  
15 as an officer aside from or in addition to  
16 president at DSMI?  
17 A. I'm not sure what you're asking.  
18 Q. Have you served at DSMI in any  
19 capacity other than president?  
20 A. No.  
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Page 6

1 directors at DSMI at any time?  
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3 directors, but a nonvoting member.  
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5 board? Have you ever been a voting member of the  
6 board?  
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9 board of directors of DSMI, are you entitled  
10 otherwise fully to participate at board meetings  
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14 Bellcore starting at the beginning of your  
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17 member of the technical staff working on 800  
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9 technical staff for how long?  
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12 at Bellcore?  
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16 Maybe three or four years, something like that.  
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18 national team called The National Services  
19 Coordinating Group, which was a team of RBOC  
20 representatives, and then I went back to working  
21 on number portability or 800 number portability

Page 8

1 again.  
2 Q. In what capacity?  
3 A. Probably in '91 or something like that  
4 I went back to number portability.  
5 Q. In what capacity did you serve then  
6 from '91 on?  
7 A. As a director for implementation.  
8 Q. Okay. When you served as a district  
9 manager, what were your job responsibilities?  
10 A. In '91?  
11 Q. Well, you said you started in '94,  
12 December, and were on the technical staff at  
13 Bellcore for about three years, and then after  
14 that you said you served as district manager at  
15 Bellcore.  
16 A. Right.  
17 Q. My question is, what were your job  
18 responsibilities as district manager at Bellcore?  
19 A. At that time frame, as I recall, we  
20 were working with the RBOCs and the industry to  
21 try and get 800 number portability put in place.

Page 9

1 I mean, my main responsibility at that time would  
2 have been as an interface to the RBOCs.  
3 Q. Why don't you define RBOCs for the  
4 record?

5 A. Regional Bell Operating Companies.

6 Q. Describe the nature of this  
7 interfacing between Bellcore with you as district  
8 manager and the RBOCs as far as number of  
9 portability. What were you doing?

10 A. The RBOCs were in the process of  
11 deploying common channel signaling networks and  
12 database networks to support 800 number  
13 portability. Bellcore at the time was their  
14 research and technical development/software  
15 development organization, so our function and my  
16 group was to coordinate the activities of the  
17 Bellcore teams in support of the RBOC deployment  
18 plans.

19 Q. Why were you called "district  
20 manager." Did that mean you had a certain  
21 geographic area where you served?

Page 10

1 A. No, they have a title structure that  
2 matched the structure that the RBOCs had, but it  
3 just meant that I was supervisor of three or four  
4 people.

5 Q. I see. After you left the district  
6 manager position, you say you served for about  
7 two years on a coordinating committee NSCC?

8 A. CG.

9 Q. CG, excuse me. When you served in  
10 that capacity, were you still a Bellcore  
11 employee?

12 A. Yes.

13 Q. Okay. Describe this NSCG for us.

14 A. It was a group of RBOC representatives  
15 who, again, were responsible for coordinating  
16 activities associated with national services,  
17 services that needed to be deployed consistently  
18 across the country. Since at the time, again,  
19 most of those services were dependent upon  
20 Bellcore software and Bellcore implementation  
21 support, they had a Bellcore person act as their

Page 11

1 secretary and coordinator.

2 Q. Okay. Have you ever had your  
3 deposition taken before?

4 A. Yes.

5 Q. Okay. While you were president of  
6 DSMI?

7 A. Yes, I was.

8 Q. Okay. When was it taken?

9 A. I don't remember. It would have been  
10 mid-90s probably.

11 Q. Was it taken in connection with  
12 litigation, a court contest?

13 A. I don't know how to respond to that.

14 Q. Was DSMI one of the parties in the  
15 case where your deposition was taken?

16 A. I don't believe so.

17 Q. Were one or more of the RBOCs parties  
18 in the litigation where your deposition was  
19 taken?

20 A. No.

21 Q. Do you remember what the issue was in

Page 12

1 the litigation?

2 A. The issue had to do with protection of  
3 Bellcore propriety documents and an ex-employee.

4 Q. I see. And was it the ex-employee's  
5 attorney who asked for your deposition?

6 A. Uh-huh, yes.

7 Q. Any other times you've had your  
8 deposition taken while being an employee of DSMI?

9 A. No.

10 Q. Okay. Have you ever testified in a  
11 court proceeding for DSMI or in relation to your  
12 employment at DSMI other than this litigation  
13 with Beehive?

14 A. No.

15 Q. How about testimony before an agency  
16 like the FCC? Have you done that while serving  
17 as president of DSMI?

18 A. I'm not sure what counts as testimony  
19 in front of the FCC.

20 Q. Anything sworn.

21 A. No.



Page 13

1 Q. Affidavits or depositions or appearing  
2 at a hearing. All of that is included in my  
3 question. With that clarification, do you still  
4 have the same answer?  
5 A. Yes.  
6 Q. Same answer, yes?  
7 A. Yes.  
8 Q. The answer is still no?  
9 A. Right.  
10 Q. Okay. I understand. Are you of sound  
11 mind this morning, Mr. Wade? No one has filed a  
12 petition against you to have you committed to any  
13 asylum to your knowledge? Is that a fair  
14 statement?  
15 A. Not that I know of.  
16 Q. You're not taking any drugs or  
17 medication that would impair your judgment or  
18 ability to answer?  
19 A. No.  
20 Q. Okay. When DSMI was organized in  
21 April of 1993, was it organized as a corporation?

Page 14

1 A. Yes.  
2 Q. Was the place of organization  
3 New Jersey?  
4 A. I'm not sure what you're asking.  
5 Q. Was it organized as a New Jersey  
6 corporation?  
7 A. No.  
8 Q. What state was it organized in?  
9 A. It's a Delaware corporation.  
10 Q. Has it always been a Delaware  
11 corporation ever since?  
12 A. Yes.  
13 Q. Has it ever had a name change?  
14 A. No.  
15 Q. Has it ever gone under any DBA or  
16 trade name since organization?  
17 A. No.  
18 Q. Has it ever changed its principal  
19 place of doing business since organization?  
20 A. I'm not sure of that. I'm not sure  
21 how the principal place is listed.

Page 15

1 Q. Where are its main offices today? In  
2 New Jersey?  
3 A. They're in New Jersey.  
4 Q. The address you gave me before when I  
5 asked for your business address?  
6 A. I don't know that, actually. I mean,  
7 that's where we do business. It may be that it's  
8 listed where the other Telcordia subsidiaries are  
9 headquartered, which is Morristown. I'm not sure  
10 what the legal company address is.  
11 Q. Okay. Morristown?  
12 A. New Jersey.  
13 Q. Prior to DSMI's becoming affiliated  
14 with whoever bought Bellcore, were you  
15 headquartered -- "you" meaning DSMI, at a place  
16 other than your present business address?  
17 A. We were originally located in  
18 Livingston, New Jersey, but then that building  
19 closed.  
20 Q. Okay.  
21 A. And we moved.

Page 16

1 Q. From Livingston you moved to the  
2 present place?  
3 A. We actually moved to another location  
4 in Piscataway and then have since moved.  
5 Q. Okay. But all the places where you've  
6 had offices and your commuter capacity and what  
7 you do generally, that's been in New Jersey from  
8 the inception; is that correct?  
9 A. Yes.  
10 Q. Okay. Aside from yourself, who were  
11 the officers of DSMI when it was formed?  
12 A. Anil Patel and Joseph Casey.  
13 Q. Okay. Please spell those for the  
14 record.  
15 A. Anil Patel is A-N-I-L, P-A-T-E-L.  
16 Joseph Casey is J-O-S-E-P-H, C-A-S-E-Y.  
17 Q. Okay. What did -- what office did  
18 Mr. Patel hold?  
19 A. He's treasurer.  
20 Q. This is at the beginning I'm asking.  
21 A. Correct.